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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

No. 81 6338

KEITH FAIR,

Petitioner,

vs

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF
BUTTS COUNTY, GEORGIA

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KEITH FAIR,

Petitioner,

vs

WALTER B. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent

PETITION FOR WRIT OF CERTORARI
TO THE SUPERIOR COURT OF
BUTTS COUNTY, GEORGIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Superior Court of Butts County, Georgia, entered on October 20, 1981. Application for certificate of probable cause to appeal was denied by the Supreme Court of Georgia on January 6, 1982.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported in Fair v State, 245 Ga. 868 (268 S.E.2d 316)(1980), cert den. 449 U.S. 986 (1981). The unreported opinion of the habeas corpus court is attached hereto as Appendex I.

JURISDICTION

Jurisdiction of this Court is involved under 28 U.S.C. § 1257 (3), Petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Code of Georgia:

§27-1404 Form of arraignment; plea of "guilty; withdrawal of plea

> Upon the arraignment of a prisoner, the indictment shall be read to him, and he shall be required to answer whether he is gulity of the offense charged in the indictment, which answer or plea shall be made orally by the prisoner or his counsel. If he shall plead "guilty," such plea shall be immediately recorded on the minutes of the court by the clerk, together with the arraignemnt; and the court shall pronounce upon such prisoner the judgment of the law, in the same manner as if he had been convicted of the offense by the verdict of a jury; but, at any time before judgment is pronounced, the prisoner may withdraw the plea of "guilty," and plead "not guilty," and such former plea shall not be given in evidence against him on his trial.

§27-2534.1 Mitigating and aggravating circumstances; death penalty

> (a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.
> (b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

****

(7) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

****

QUESTIONS PRESENTED

-1-

Whether Petitioner's guilty plea to capital murder violated the Fifth and Fourteenth Amendments to the United States Constitution in that his plea was involuntarily made without a full understanding of the consequences of the plea?

-2-

Whether the Georgia Supreme Court's opinion below denied Petitioner due process of law and right to trial by jury, by its new and novel application of Georgia law in denying Petitioner his statutory right to withdraw his plea of guilty and proceding to trial?

-3-

Whether Petitioner was denied due process of law by the imposition of a sentence of death based on a felony for which Petitioner was later acquitted?

-4-

Whether Petitioner was denied due process of law by the imposition of a sentence of death where there is no factual basis to sustain same under Godfrey v Georgia, 446 U.S. 420 (1980)?

-5-

Whether introduction at Petitioner's capital sentencing trial of testimony given pursuant to undisclosed promises of leniency denied Petitioner due process of law?

HOW THE ISSUES WERE RAISED BELOW

-1-

Questions 1,2,4, and 5 were first raised in Petitioner's Petition for Writ of Habeas Corpus which was heard and rejected by the Superior Court of Butts County, Georgia. The Georgia Supreme Court then denied Petitioner's Application for Probable Cause to Appeal those issues.

-2-

Petitioner's challenge to his sentence of death based upon a felony for which he was later acquitted was first raised on direct appeal to the Supreme Court of Georgia. That Court rejected Petitioner's claim in Fair v State, 245 Ga. 868, (268 S.E.2d 361)(1980). The issue was then raised in Petitioner's Petition for Writ of Habeas Corpus which was heard and rejected by the Supreme Court of Georgia then denied Petitioner's Application for Probable Cause to Appeal the issue.

STATEMENT OF THE CASE

The Petitioner, KEITH FAIR, was indicted in the Superior Court of Hall County, Georgia, for the murder of one JACKIE MORRIS. After pretrial motions and other matters were concluded by the trial court, the petitioner plead guilty to the murder and submitted the issue of punishment to the trial judge without a jury (T-3-21). The trial judge accepted the plea (T-19) and conducted a full scale sentencing trial on the issue of punishmnet.

The State contended that the petitioner and his accomplices, including Jackie Morris, had killed an individual in Habersham County in a dispute over a money matter. Later that night, Jackie Morris was killed in Hall County, Georgia. The State charged the petitioner during the sentencing trial with violations of § (b)(2) and § (b)(7); the theory being that the murder of Morris was committed while the petitioner was engaged in the commission of the murder of the Habersham County victim.

After the sentence hearing and a nights deliberation, the trial judge orally announced that the death penalty would be imposed and petitioner immediately withdrew his plea of guilty orally and by written withdrawal. (T-484, 487, R-9-22). Both the oral and written withdrawals were accomplished prior the the sentence being received by the clerk and entered upon the docket (T-490); and there is no issue of fact regarding the timing of petitioner's withdrawal. See Fair v Stste, 245 Ga. 868, 875(7). However, the trial court refused petitioner's withdrawal (T-491) and entered the sentence of death.

The Georgia Supreme Court (Fair v State, 245 Ga. 868) affirmed the death sentence based on § (b)(2) and § (b)(7). The temporal and spatial separation of the two capital felonies did not prevent the Court from concluding that both murders were "part of a continuous transaction and. . . were mutually dependent crimes." Id. at 870

Further, petitioner was subsequently acquitted of the first murder in a separate trial (see record), but the Georgia Supreme Court found this to be no obstacle to affirming the findings of § (b)(2). In other words, the sentence of death was upheld for murder number two (Morris) based on the aggravating circumstances that he had also committed murder number one; yet, in a separate trial, petitioner was found not guilty of murder number one. The Court observed that two different triers of fact were involved and "different triers of fact may reach different results". Id.at 871, 881.

Further, the Court ruled that the § (b)(7) findings of "depravity of mind" was justified because the victim was abused after death based on a decision made after this opinion. Id. at 881, Hance v State, 245 Ga. 856.

On June 24, 1980, after this Court's decision in Godfrey v Georgia, 446 U.S. 420 (1980), without any notice to counsel that it was reexamining the case, the Georgia Supreme Court issued an addendum to its initial affirmance announcing that the validity of the death sentence was not affected by Godfrey*

*This conduct is itself startling to this writer. Indeed, six other Georgia death cases were vacated and remanded for reconsideration in light of Godfrey. The Georgia Supreme Court reinstated all six death sentences and refused to allow counsel for any of the defendants to argue or brief the Godfrey issues. See, e.g. Baker v State, No. 34588(July 15, 1980). Surely, the right to notice and an opportunity to be heard is the very essence of justice, and is a fundamental condition "universally prescribed in all sustems of law established by civilized countries." Twining v New Jersey, 211 U.S. 78, 111(1908).

Petitioner next filed a petition for writ of certiorari to this Court which was denied.

A petition for Writ of Habeas Corpus was then filed in the Superior Court of Butts County, Georgia, on June 4, 1981. The habeas court entered an order denying the petition as to all relief requested, a copy of that order being Appendix I attached hereto. On January 6, 1982, the Georgia Supreme Court denied petitioner's application for a certificate of probable cause to appeal the habeas order.

REASONS FOR GRANTING THE WRIT

I. PETITIONER'S GUILTY PLEA VIOLATED THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT HIS PLEA WAS INVOLUNTARILY MADE WITHOUT A FULL UNDERSTANDING OF THE CONSEQUENCES OF THE PLEA

The habeas court improperly found that Petitioner's plea of guilty to capital murder was voluntarily, knowingly, and intelligently made under the Fifth and Fourteenth Amendments to the United States Constitution.

The habeas court made the following findings of fact, inter alia:

> ". . .based on their extensive legal research, they [trial counsel] concluded under Ga. Code Ann. 27-1404, that Petitioner had the absolute right to withdraw his guilty plea after sentence was pronounced but before it was filed with the clerk (H.T. 23,69). They prepared a contingency plan for withdrawing Petitioner's plea (H.T. 12-15, 66-69). . . .When the trial judge imposed a death sentence, Counsel attempted to withdraw Petitioner's plea, but the trial judge refused to allow withdrawal (H.T. 12-15, 66-69).
>
> **********
>
> "Prior to accepting Petitioner's plea of guilty, the trial court exhaustively examined the appellant to determine if the plea was voluntarily and intelligently given;" informed Petitioner and his counsel that the Court was not conscientiously imposed (sic) to capital

> punishment and would impose a death sentence if the facts warranted it; recessed to allow Petitioner to confer again with his counsel; and thereafter accepted Petitioner's plea of guilty."

In addition, trial counsel testified that he advised Petitioner that he had an "absolute right" to withdraw his plea of guilty (H.T. 10-11); and that this formed Petitioner's basis for the plea itself (H.T. 12). Further, that Petitioner indicated that he desired a jury trial (H.T. 23); and that "in any event . . .we could always get a jury trial" (H.T. 25, 67, 70).

Petitioner testified unequivocally that the "only reason I pled guilty" was with the understanding that the plea could be withdrawn, as a matter of right, and "they had to . . . let me have a jury trial" (H.T. 55).

Finally, the trial court, in pre-trial proceedings, specifically reminded counsel and Petitioner that he could change his plea and go to trial. (T.T. 532; H.T. 29).

The decision whether to plead guilty or to contest a criminal charge is probably the most important single decision in any criminal case, especially so in a death case.

When a man facing the electric chair retains or is appointed counsel, a portion of his life (if not his life itself) is delegated to one who has both the legal and moral duty to defend his interests. The notion of the attorney as "agent" goes back to the Greek practice of employing a speech writer when a litigant had to address the Athenain assembly to obtain a legal judgment. This role of the lawyer remained essentially undeveloped through eras when the law itself was less complex. Indeed, some of the colonies prohibited legal representation for money, convinced

that lawyers made complex that which was simple, and poisoned the well of justice through greed, delay and obstruction. However, as the legal and social order grew in complexity, the notion of the lawyer as an agent conducting litigation in behalf of his client also grew. This development in the concept of "representation" has become the vehicle for mystifying the complexities of the law and rendering it virtually incomprehensible to the average criminal defendant.

Thus, as the very complexity of law forces a man to speak through an agent, the advice of the agent, his competence, and his ability to waive the rights of his principal becomes highly relevant.

As early as 1927, this Court in Kercheval v United States, 274 US 220(1927) recognized that a guilty plea should not be accepted unless voluntarily and knowingly made. A number of later cases have reiterated this principal. E.g. Boykin v Alamaba, 395 US 238(1969); Brady v United States, 397 US 742 (1970); McCarthy v United States, 394 US 459.

The standard by which guilty pleas must be gauged was announced by this Court in Johnson v Zerbst, 304 US 458(1938): that a waiver of any federal constitutional right, to be effective, must be an "intentional relinquishment or abandonment of a known right." Id. at 464.

Subsequest cases have muddied the guilty plea waters. In the guilty plea trilogy (McMann, Parker and Brady)* this

*McMann v Richardson, 397 US 759(1970); Parker v North Carolina, 397 US 790(1970); Brady v United States, 397 US 742(1970).

Court apparently concluded that a competently counseled guilty plea could be presumed knowing and voluntary. See also Tollett v Henderson, 411 US 258(1973).

In McMann v Richardson, supra, the court held that a defendant, when pleading guilty, assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts and is bound by his plea unless he can show serious derelictions on the part of his counsel sufficient to show the plea was not voluntary, knowing, and intelligent.

However, McMann also holds that, since a guilty plea is also a waiver of trial, unless applicable law otherwise provides, the plea must be made with sufficient awareness of its consequences. McMann v Richardson, 397 US at 766.

That this distinction is critical sub judice is reinforced by the decision in Lefkowitz v Newsome, 420 US 283(1975). There, the Supreme Court majority, in an opinion by Mr. Justice Stewart, concluded that the significance of a guilty plea is determined by the law of the jurisdiction that conducts the proceedings in which the plea is entered. The Court observed that ordinarily a guilty plea represents a "break in the chain of events which has preceded it in the criminal process." Id at 239. But because New York had legislatively "chosen not to treat a guilty plea as such a 'break in the chain of events' with regard to certain constitutional claims", a defendant who had pleaded guilty in New York would not be barred from asserting those claims in the future.

By Code Ann. §24-1404, Georgia has provided just such a 'break in the chain of events' in the guilty plea context. The Constitutional claim sought to be protected: the right to a trial by jury.

That this is the proper historical context is reflected in the early cases interpreting this Code Section. Illustrative of these cases is Woodward v State, 13 Ga. App. 130. In discussing what was then Penal Code (1910) §971*, the court held that "the right which the statute gives to the prisoner to withdraw his plea of guilty before judgment is pronounced is without qualification". Id. at 131. Further, the court clearly and unequivocally stated the purpose of this statute:

> "It is not the purpose of the law to invite pleas of guilty by persons charged with crime, but rather is it (sic) the purpose of the law to guarantee to all persons charged with a crime a trial by jury.
>
> Id. at 131 (emphasis added)

This clearly shows the interrelationship of the instant case with the Johnson - McMann - Lefkowitz requirements. First, petitioner's plea could not have been a relinquishment of a known right to a jury trial pursuant to the Johnson v Zerbst, supra. Petitioner's action cannot be construed as an intelligent waiver of his right to use the established proceedure to secure a trial by jury. Second, this "known right" is precisely the type of "break in the chain of events" envisioned by McMann and Lefkowtz. Third, the right protected is an important constitutional guarantee: trial by jury. Fourth, the nature of the sanction is extreme.

*Penal Code (1910), §971 declares, in pertinent part, that "at any time before judgment is pronounced, the prisoner may withdraw the plea of 'guilty', and plead 'not guilty.'"

Prior to the Georgia Supreme Court's decision in Fair, Ga. Code Ann. §24-1404, (and its consistent judicial interpretation) promised any accused pleading guilty security from the imposition of sentence without the verdict of a jury. Can not the statutes and decisions be accurately characterized as a legislative and judicial promise of a jury trial to any criminal accused who timely withdraws his plea of guilty? Is there any reason why Fair's guilty plea, based on the inducement of the statute and decisions, should not be considered any less a product of coercion because it was induced by a legislative and judicial inducement than by prosecutorial or judicial offers of sentencing concessions?

It is not suggested that an unattainable perfect knowledge is necessary before a defendant can enter a valid guilty plea. The task of the courts is to draw a line somewhere between perfect knowledge and absolute ignorance; and to specify the extent to which an accused is entitled to "know the score" before waiving his right to trial. Simply stated, Petitioner's plea in this case-given the unique nature of guilty pleas in Georgia - was not knowingly made and he was denied his right to a trial by jury; therefore, his conviction and sentence must be reversed.

II. THE APPLICATION TO PETITIONER'S CASE OF THE NOVEL CONSTRUCTION OF CODE ANN. §27-1404 DENIES PETITIONER DUE PROCESS OF LAW AS GUARANTEED BY THE 5th AND 14th AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As outlined above, present Code §27-1404 has been consistently interpreted as guaranteeing a criminal defendant the right to withdraw his plea prior to pronouncement of sentence.

See, e.g. Woodward v State, supra; Clark v State, (1945) 72 Ga. App. 603; Wright v State, (1947) 75 Ga. App. 764; Farmer v State, (1974) 128 Ga. App. 461; Ware v State, (1974) 123 Ga. App. 406; Burkett v State, (1974) 131 Ga. App. 177; Williams v State, (1979) 148 Ga. App. 521.

In Fair, supra, the Georgia Supreme Court saw this "question of first impression" as "whether or to what extent Code Ann. 827-1404 applies to Ga.L. 1973, p. 159 et.seq." Id. at 876. The Court concluded that "a guilty plea, voluntarily and knowingly entered in a capital felony case. . .wherein the state seeks the death penalty. . .may not be withdrawn as a matter of right." 245 Ga. at 878.

Thus, the procedural setting is clear: A clear unequivocal statutory right, and a case of first impression expressly and by implication changing approximately one hundred years of precedent.

In Bouie v City of Columbia, 378 US 347(1964) this Court held:

> "When a State Court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law, in its primary sense of an opportunity to be heard and to defend (his) substansive rights." Bunkerhoff-Fans Trust and Savings Co. v Hill, 281 US 673.

Further, it is well settled that state courts may not juggle their laws in an unpredictable and inconsistent fashion to the prejudice of federal constitutional rights. See, e.g. Staub v Baxley, 355 US 313, 320 (1953); NAACP ex rel. Patterson v Alabama, 357 US 449, 454-458 (1948); NAACP v Alabama, ex rel. Flowers, 377 US 288, 293-301 (1964); Wright v Georgia, 373 US 284, 289-291 (1963).

In Paul v Davis, 424 US 693 (1976) this Court aptly summarized its position as follows:

> "It is apparent from our decisions that there exists a variety of interests which are difficult in definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property', as meant by the Due Process Clause. These interests attain constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the proceedural guarantees of the Fourteenth Amendment apply whenever the state seeks to remove or significantly alter that protected status. . . In each of these cases, as a result of the state action complained of, a right or status previously recognized by the state law was distinctly altered or extinguished. It was this alteration officially removing the interest from the recognition and protection previously afforded by the state, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment."

In the instant case, what Petitioner complains of is the unforseeable judicial curtailment of his statutory rights by the Georgia Supreme Court by its affirmance of Petitioner's conviction and resultant death sentence. While the decision in Fair is unique in many respects, perhaps its most startling conclusion is that a defendant in a capital felony cannot withdraw his guilty plea. This Court has heard many times of the "qualitative difference" between capital cases and criminal cases in general, and the "corresponding difference in the need for reliability" in captial punishment. Woodson v North Carolina, 428 US at 305 (1976). Yet, in Fair the Georgia Supreme Court now implicitly holds that a misdemeanor defendant has more rights than a capital defendant!

The proposition that procedures sufficient to warrant less severe penalties may violate the Eighth Amendment when used to obtain a death sentence has received judicial recognition in a long line of cases. See Lockett v Ohio, 438 US 586 (1978); Roberts v Louisiana, 431 US 633 (1977); Gardner v Florida, 430 US 349 (1977); Woodson v North Carolina, supra. The situation is now reversed in Georgia: death defendants have one less right than do defendants in all other cases.

In what position, then, is the accused whose counsel fails to anticipate a subsequent change in the law as proclaimed by the highest court of his state? The decision of counsel and accused persons are reduced to a mockery if constitutional right of a capital defendant depend on the foresight of counsel in anticipating a new legal development. This Court has long recognized that "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct." Lemon v Kurtzman, 411 US 192, 199 (1973). The law "as it was relied upon is '. . .an operative fact and may have consequences which cannot justly be ignored.' The past cannot be erased by a new judicial declaration." Chicor County Drainage District v Baxter State Bank, 308 US 371, 374 (1940). These principles have allegedly been adopted by the Georgia Supreme Court. See, e.g. Allan v Allan, 236 Ga. 199 (1976); Strickland v Newton County, 244 Ga. 54 (1979); Walker v Walker, 247 Ga. 502, 503 (1981). Petitioner submits

that the decision of the Georgia Supreme Court in the instant action had the effect of retroactively denying him his constitutional right to a trial by jury, thus depriving him of due process of law. Bouie v City of Columbia, supra. Accordingly, Petitioner's conviction and the resultant death sentence must be reversed.

THE DEATH SENTENCE*

III. (A) THE DEATH PENALTY BASED ON CODE ANN. § 27-2534.1(b)(2) VIOLATED PETITIONER'S RIGHTS TO DUE PROCESS OF LAW.

In Fair, the Georgia Supreme Court upheld Petitioner's sentence of death because the murder in Hall County "occured during the commission of another capital felony." Code Ann. §27-2534.1(b)(2). 245 Ga. at 870

That § (b)(2) is constitutional on its face was settled by Gregg v Georgia, 428 US 153 (1976) ("On their face these procedures seem to satisfy the concerns of Furman.") That a section may be unconstitutional in its application was most recently seen in Godfrey v Georgia, 446 US 420 (1980).

Code Ann. §27-2534.1(b)(2) provides in pertinent part as follows:

> "The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony. . ."

It is submitted that the construction given by the Georgia Supreme Court to the Section (b)(2) aggravating circumstance in affirming Petitoner's sentence of death was unconstitutionally broad and violated the Fifth, Sixth , and Fourteenth Amendments to the United States Constitution.

*Included here are reasons III and IV.

In his concurrence in Gregg, Justice White stated that the purpose behind §(b)(2) is to allow the state to seek the death penalty in "witness-elimination" murders. 428 US at 221, n.10. Of course, every murder is a witness elimination murder in the sense that at lease one witness - the victim - is elminiated. However, it is clear that §(b)(2) cannot, consistent with the Constitution, apply to all murders. Gregg, supra, at 200.*

Two factors become apparent in an analysis of the statutory language. First, the statute is circumscribed by its own manifest temporal restriction, i.e. the "while engaged in the commission" clause. In the instant action, it certainly requires an over broad construction of §(b)(2) to justify the imposition of the death penalty, especially in light of the significant temporal and spatial separation of the two crimes. To allow such an overbroad construction to stand would, in effect, provide the sentencer with a vehicle to circumvent the objective and limited standards clearly set out in the statute defining when and under what circumstances the death penalty may be imposed. Gregg v Georgia, supra; Godfrey v Georgia, supra. Further, the clause "...while engaged in the commission" may be distinguished from the cluase "as a result of an act."** "While engaged

*The import of Justice White's remark in Gregg is that a necessary condition for a fulfillment of the conditions of §(b)(2) is that the defendant has killed someone to avoid being identified as the perpetrator of another crime.

**Even assuming the murder of Morris was "a result" of the death of Turner (Habersham County) it is insufficient to prove that it was done "in the commission" of killing Turner.

in the commission..." language connotes those elements of the act or transaction itself. The Georgia Supreme Court spoke to this issue in Groves v State, 116 Ga. 516 (1902), "Commission means the act of committing, doing or performing the act of perpetrating." At no point in time has the state even claimed, let alone proved, that Morris was murdered by petitioner while petitioner was engaged in the commission of the murder of Turner. Accordingly, it is clear that imposition of the death penalty could not have been imposed pursuant to the "while engaged in the commission of..." clause of the statute.

Second, the offense must have been committed while "the offender" was engaged in other specified acts. The legislative intent here is plain, viz: there must be a nexus between the elements of a capital felony performed by the defendant and the murder in question. The language of the statute itself requires that the underlying felony be "committed" by "the offender." However, petitioner has subsequently been acquitted of the murder in Habersham County, Georgia, which serves as the basis of the [redacted](b)(2) finding. The Georgia Supreme Court did not view this as any problem in affirming petitioner's sentence of death. Astonishingly, the court saw no problem in establishing the requisite nexus between the two crimes, irrespective of the acquittal.[the Georgia Supreme Court's affirmance made no mention of the requirement of the statutory language itself; or the necessity that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v Florida, supra at 358.] The Court relied instead on the language in Hooks v State,233 Ga. 149(1979), that the Georgia death statute "does not require a conviction to find aggravated circumstances." Id. at 151.*

*Hooks also involved a plea of guilty which resulted in a death sentence.

No authority for this statement was cited, nor was it explained in any way.

It is readily apparent, however, that a lack of conviction is legally separate and distinct from acquittal. A pending case, or a "lack of conviction" is somewhat of a legal vacuum, e.g. there has been no disposition of the charges, and no resolution of the reasonable doubt requirement of a conviction. An acquittal, on the other hand, is defined as the "legal and formal certification of the innocence of a person..." (Blacks Law Dictionary, 4th Edition) and is a determination of the lack of proof beyond a reasonable doubt necessary for a conviction. If, as required by Code Ann. §27-2534.1(c), an aggravating circumstance must be found to exist beyond a reasonable doubt, then all elements therein must also be found to exist beyond a reasonable doubt. In petitioner's case, he was acquitted of the underlying offense, a certification that the state failed beyond a reasonable doubt. Whether "different triers of fact may reach different results" means nothing if the elements of the statutory requirements for imposition of the death sentence cannot be met.

The death sentence based on §(b)(2) cannot stand in light of the above, and the necessity for greater reliability required in death cases, Woodson v North Carolina, supra; Gardner v Florida, supra. This expansive construction of §(b)(2) in its application to the facts of petitioner's case suffers from the same overbreadth as the construction of §(b)(2) in Godfrey (see below) and must be reversed.

(B) THE GODFREY ISSUE.

The decision in petitioner's case, which also rested on a §(b)(2) finding, was affirmed by the Georgia Supreme Court prior to this Court's decision in Godfrey, supra. On June 24, 1980, without any notice to counsel that it was re-examining this case, the Georgia Supreme Court issued an Addendum to its initial affirmance in light of Godfrey. The Court affirmed the death sentence finding "material differences between Godfrey and the case under review" (245 Ga. at 880) and that Petitioner's actions were "out of the category of 'ordinary murders'". 245 Ga. at 881.

As a general proposition, the plurality decision in Godfrey decided that the United States Constitution imposes substantive limits on the state's ability to construe broadly the language of §(b)(7). Once a limiting construction is deemed to be constitutionally required, the state must ensure that these limits are respected. Thus, Justice Stewart noted that the Georgia Supreme Court has a "responsibility to keep section §(b)(7) within constitutional bounds." Godfrey, 110 S Ct. at 1765. After proclaiming the need for a limiting construction of § (b)(7), the plurality launched into an extended discussion of the Georgia case law interpreting section §(b)(7) to determine what, if any, narrowing construction had been supplied by the Georgia Supreme Court. The plurality opinion stated that the Georgia Supreme Court had reached three separate but consistent conclusions concerning this section: (a) that the evidence that the offense was "outrageously or wantonly vile,

horrible or inhuman" had to demonstrate "torture, depravity of mind, or an aggravated battery to the victim"; (b) that the phrase "depravity of mind" comprehended only the kind of mental state that led the murderer to torture or commit an aggravated battery before killing his victim; and (c) that the word "torture" must be construed in pari materia with "aggravated battery" so as to receive evidence of serious physical abuse of the victim before death. 100 S.Ct. at 1766.

The plurality ascribed its tripartite interpretation of (b)(7) to the Georgia Supreme Court's opinion in Harris v State 237 Ga. 718 (1976), and Blake v State, 239 Ga. 292 (1977).*

In Petitioner's case - not cited in any of the Godfrey opinions - the Georgia Supreme Court simply chose not to apply any of these criteria. Fair, supra, does discuss the interpretation of Section (b)(7); but it directly contradicts the Harris-Blake criteria that, in the view of this Court in Godfrey, has been the Georgia law since 1977.

The trial court found that the murder in petitioner's case was outrageously and wantonly vile, horrible and inhuman, in that it involved depravity of mind on the part of the defendant. (T-492-494). In language that directly refutes its statement in Blake, the Georgia Supreme Court ruled that:

*The crucial language of Blake is as follows: "That is to say, the depravity of mind contemplated by the statute is that which results in torture or aggravated battery to the victim." 239 Ga. at 299.

> "The statute §(b)(7) is worded in the disjunctive, not the conjunctive. It is not required that a trier of fact find the existance of each disjunctive phrase of the statute, only that at least one phrase of the first clause of the statute exists due to the existence of at least one phrase of the second clause of the statute." 245 Ga. at 872.

The court concluded its treatment of this issue by stating, "Furthermore, this court has upheld an identical finding of this statutory aggravating circumstance in Corn v State, 240 Ga. 130 (240 S.E.2d 694)(1977)." Id. at 872. In Corn, the court merely followed its all-too-common practice of simply quoting the finding of §(b)(7) and concluding without further discussion that "the evidence supports the statutory aggravating circumstances found."

Contrary to the statement of Blake, a finding of "depravity of mind" was not wholly independent and separable from torture and aggravated battery! Fair is certainly clear in that §(b)(7) is to be applied in the disjunctive. Justice White might well be surprised by this language in Fair as he declared in his Godfrey dissent, "Indeed, the Georgia Supreme Court has expressly rejected an analysis that would apply the provisions disjunctively...An analysis that, if adopted would arguably be assailable on constitutional grounds." Godfrey v Georgia, 100 S.Ct. at 1778 (White, J., dessenting)(emphasis added) See also, Stromberg v California, 238 US 359, 367-70(1931). Since the Georgia Supreme Court did explicitly and unmistakeably adopt this position in Fair, Justice White apparently would find the Georgia Court's construction of §(b)(7) in Fair constitutionally repugnant.

But, when faced in Fair with a finding of "depravity of mind" where no torture or aggravated battery to the victim occured before death*, the court entirely repudiated the notion that the depravity of mind contemplated by the statute is that which results in torture or aggravated battery to the victim. Of course, if the Blake language had governed, the finding of §(b)(7) could not have been sustained. Thus, the Georgia Supreme Court reached two wholly contradictory conclusions about section (b)(7) in Blake and Fair.

This Court's narrow construction of §(b)(7), derived from Harris and Blake, specified that a finding of "Depravity of mind" requires that the defendant possess a mental state causing him to torture or commit an aggravated battery against the victim. This requirement is not satisfied unless the defendant intentionally inflicted serious physical abuse upon the victim before death. Godfrey, supra, 100 S.CT. at 1766. The plurality pointed out that these requirements were not met in Godfrey. Clearly, they are also not met in the case sub judice.

Godfrey is pivotal in determining which acts do not constitute torture or aggravated battery. First, an aggravated

*Lack of factual support for this proposition is apparent in Petitioner's case from the testimony of Dr.Byron Dawson, pathologist at the Georgia State Crime Lab:"...I saw no evidence that would be...or, no injuries, or other findings that would be consistent with a torture." (T-145)

Dr.Dawson's testimony revealed further that, although the victim was shot at least three times, two shots were fired into the head and if fired first, the victim was rendered unconscious and had no conscious sense of pain. (T-136, 137,143-141). The fact that no physical suffering, torture, or injury prior to death occured was not contested by the State (Respondents brief, p.24). Further, the trial judge in his report to the Georgia Supreme Court responded negatively to the question of whether or not the victim had been physically harmed or tortured.(R-98).

battery cannot exist where the victim has not suffered any physical injury preceding his death. 100 S.Ct. at 1766. Thus, any murder resulting in instantaneous death, regardless of the manner by which this result is accomplished or the gruesomeness of ensuing scene, will not be considered to involve torture. 100 S.Ct. at 1767, n.16.

Accordingly, under this criteria, "depravity of mind" comprehends only the kind of mental state that leads to torture or aggravated battery before killing the victim, the absence of torture or aggravated battery in petitioner's case, as in Godfrey, established conclusively that Petitioner did not have the requisite "depravity of mind" sufficient to fulfill the requirements of [redacted](b)(7).

Having reached this conclusion, the reversal of petitioner's death sentence is mandated by well-established constitutional principles. First, the Georgia Supreme Court's affirmance of Fair's death sentence violates the basic precept that the state must prove every element of an offense constituting an aggravating circusmtance beyond a reasonable doubt. In re Windship, 397 US 358 (1970); Jackson v Virginia, 443 US 307(1979); Ga. Code Ann. 27-2534.1(c). The conclusion that the circumstances of this case do not meet the criteria for imposition of death is constitutionally equivalent to the statement that the state has failed to prove every element of [redacted](b)(7) beyond a reasonable doubt.

Second, since there was no evidence that torture or aggravated battery existed, Petitioner's death sentence also violates the "no evidence" rule of Thompson v Louisville, 362 US 199 (1960), in derogation of Fairs right to due process of law. This absence of evidentiary support for the finding of section (b)(7) is, by definition, arbitrary: Schware v Board of Bar Examiners, 353 US 232, 239 (1957), and cannot supply any principled way to distinguish a " ...case in which the death penalty is imposed, from the many cases in which it was not."

Third, the Petitioner's death sentence is violative of his right to due process of law, as announced in Bouie v City of Columbia, supra. See II, infra. The affirmance of Fair's death sentence is a change in the court's construction of the statutory aggravating circumstance. In effect, conduct that previously would not have been considered as included within the meaning of section (b)(7) under the Harris - Blake criteria was brought within its contours by the court's new interpretation in Fair. It is well established that such unforseeable judicial enlargement of a criminal statute violates due process where applied retroactively. See III, infra.

In its Addendum, the Georgia Supreme Court has simply ignored the Godfrey analysis of the Harris - Blake criteria. Ignoring the explicit limitation requiring "evidence of serious

physical abuse of the victim before death" (100 S Ct. 1766, emphasis added) the court ruled that a finding of "depravity of mind" was justified because the victim was abused after death.* 245 Ga. at 880. As authority for this belated proposition, the court cited Hance v State, 245 Ga. 856; decided June 24, 1980, the same day as the Fair Addendum and 2½ months after the decision in Fair (April 9, 1980). Further, the Hance opinion, written by Justice Hall, offers no support for this proposition, but merely states it in conclusory fashion. Hance, supra, at 862. Again, the constitutional infirmity of this proceedure is obvious, as a proper trial interpretation of section (b)(7) is a defect that "could not be cured by the post hoc narrowing construction of an appellate court." Godfrey, supra, 100 S Ct. at 1769 (Marshall, J.)

One final point must be made. In the Fair Addendum, the Georgia Supreme Court noted that when a sentence of death is based on finding of more than one aggravating circumstance, the invalidity of one does not preclude the imposition of the death sentence on the basis of the other aggravating circumstance. Fair, supra, at 880. In Gates v State, 244 Ga.

*Evidence was presented that, after death, petitioner's accomplice Dexter Thomas, (see Thomas v State, 246 Ga. 484 (1980)) leaned into Morris's car and cut his throat with a pocket knife. In Fair, the Supreme Court acknowledged this as fact in its Addendum by stating "Appellants accomplice cut the victim's throat and then burned the body". Fair, 245 Ga. at 880-881. Evidence at trial was much disputed on both issues; i.e. evidence indicated that Thomas cut victim's throat and set fire to the car containing the body of the victim. (T-414-417)

(1980), the Court ruled that where the jury found three aggravating circumstances, one of which was subsequently held unconstitutional, the sentence of death could not stand on the basis of the other two. Id. at 406. Thus, when discretion is exercised in favor of death on the basis of finding of more than one aggravating circumstance, the failure of any one circumstance invalidates the death sentence. The contrary view is necessarily predicated on the purely speculative argument that the discretion would have been exercised the same way even if one of the essential props for the death penalty had been absent. The affirmance of a death sentence on such a speculative basis violates both the due process clause and the Eighth Amendment. See, Hicks v Oklahoma, 447 US 343 (1980); Godfrey, supra, 100 S Ct. at 1769 (Marshall, J., concurring).

For the foregoing reasons, Petitioner's sentence of death must be vacated.

V. WHETHER INTRODUCTION AT PETITIONER'S SENTENCING TRIAL OF THE TESTIMONY OF MICHAEL MARABLE DENIED PETITIONER'S RIGHT TO DUE PROCESS OF LAW IN THAT SAID TESTIMONY WAS GIVEN PURSUANT TO PROMISES OF LENIENCY GIVEN TO HIM WHICH WERE NOT DISCLOSED TO THE SENTENCING COURT.

The habeas court erred in denying Petitioner's challenge to the testimony of witness Marable because, contrary to the conclusion of the habeas court, there were promises of leiency known to the prosecution, but undisclosed to the trial court.

The record shows that on or about August 9, 1979, witness Marable was apprehended after escaping from the Forsyth County, Georgia, jail with Petitioner. See Stroberg deposition, p.4

5, and Exhibit 1 attached thereto. Marable gave a taped interview on August 9, 1979, to prosecutor Stroberg after promises of reduced sentences in pending cases (H.T.42); favorable recommendations to the sentencing judge (H.T.42-43 Stroberg deposition p.11; Exhibit 1, p. 27); and special promises not to prosecute his girlfriend for aiding his escape (H.T.48); and prison assignment (Stroberg deposition, Exhibit 1, p. 28).

Further, on August 10, 1979, witness Marable pled guilty in the Superior Court of Forsyth County, Georgia, to the offenses of Criminal Interference with Government Property, Escape, Motor Vehicle Theft (Two Counts), and Burglary. In his Petition to Enter Plea of Guilty (H.T.84), Marable checked yes for question number 30: Has any plea agreement been made by you with anyone which causes you to plead GUILTY? And he described the agreement as a sentence of "10 years to serve 5 - and agreement to testify for the State in any cases I have knowledge of" (H.T.84). The actual sentence entered by the Court is reflected in the habeas transcript at pages 81 and 82. It is to be noted that, as a special condition to Marable's sentence, he was required to:

> "...testify fully and truthfully to... his knowledge of conversations had with Keith Fair concerning the murders with which Fair is charged..."

Petitioner plead guilty on August 13, 1979, and witness Marable testified the following day. Further, the District Attorney, upon specific request by Defense Counsel, denied any knowledge of promises made to any witness. (T.T.41)

Of course, the criminal defendant has a constitutional right to the disclosure of all favorable or exculpatory evidence in the possession of the government, pursuant to the due process clause of the Fifth and Fourteenth Amendments. Brady v Maryland, 373 US 83(1963). This right exists whether such evidence is material to the defendants guilt or to mitigation of his punishment, and "irrespective of the good faith or bad faith of the prosecution". Brady, supra, at 87.

A specific and timely request was made for this material, and the district attorney specifically denied any knowledge of or possession of any. (T-41) However, the obligation to disclose favorable evidence is that of the government, and failure to disclose such information is not excused merely because the prosecutor did not have actual knowledge of it. Barbee v Warden, 331 F2d 842 (4th Cir 1967); Rhinehart v Rhay; 440 F2d 725 (9th Cir 1971); United States v Bryant, 439 F2d 642 (D.C. Cir 1971). See also United States v Roberts, 339 F2d 646 (2nd Cir 1968).

Indeed, in Giglio v United States, 405 US 150 (1972), a promise of leniency made to a witness by the prosecuting attorney conducting a grand jury investigation was attributed to a different prosecutor presenting the case at trial.

This constitutional requirement extends to evidence "favorable to the accused either direct or impeaching". Willaims v Dutton, 400 F2d 797 (5th Cir. 1968). Specifically,

courts have held the criminal record of prosection witnesses must be produced, In re Ferguson, 489, F2d 1234 (9th Cir.1971); and any indication of the unreliability of government witnesses, Mesarosh v United States 352 US 1(1956), must also be produced.

Further, in Giglio v United States, supra, this Court held that promises of leniency or non-prosecution to key government witnesses is material discoverable under Brady. Accord Allen v State, 128 Ga. App. 361(1973), where the Georgia Court of Appeals recognized that it is "well settled that evidence of an expectation of leniency by a prosecution witness who is or could be charged or convicted of a crime is relevant to the question of his credibility", and that "the jury is entitled to know of it; the prosecutor has a duty to disclose it; and the failure to make this disclosure violates due process and requires the reversal of the conviction and a remand for a new trial." Id. at 364.

A prosecutor has many ways in which to coax cooperative testimony from a reluctant witness: immunity grants (Annunziato v Manson, 566, F2d 410(2nd Cir 1977)); United States v Librach, 520 F2d 550 (8th Cir 1975)); dropped or reduced charges (Giglio, supra, Blankenship v Estelle, 545 F2d 510 (5th Cir. 1977)); or monetary payments (United States v Jackson, 579 F2d 553 (10th Cir 1978); United States v Librach, supra. He also may make a general promise to bring the witness' cooperation to the attention of the sentencing judge, as in the instant case (see also United States v Harris, 498 F2d 1164(3rd Cir. 1974)); or make specific recommendations for

reduced sentences (Napue v Illinois, 360 US 246 (1959).

Whatever the method, by altering a prospective witness' perception of his self-interest, a promise or inference of favorable treatment induces him to further the trial process rather than resist it.

Despite assertions to the contrary, promises of favorable treatment or sentences conditioned on "cooperative" testimony create a clear incentive for falsification. See United States v Meinster, 619 F2d 1041, 1044-45(4th Cir 1980); Boone v Paderick, 541 F2d 447, 448 (4th Cir. 1976). The wintess now has a compelling motive to give testimony harmful to the accused. Indeed, vague or tentative promises may intensify this incentive for falsification. Thus, when the prosecutor tells the prospective witness; "I'll do what I can for you, but I'm not promising anything," (Stroberg deposition, p.11, 19,20; Exhibit 1, p.25-28), the witness may see leniency as a function of the damning quality of his testimony. Boone v Paderick, supra ("The more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor.") A prosecutor makes a promise of favorable treatment, whether vague or explicit, precisely because of its anticipated impact of the wintess' testimony. United States v Gerard, 491 F2d 1300 (9th Cir. 1974).

Thus, the courts agree that a prosecutor's failure to disclose favorable treatment may violate due process because it is essential for the trier of fact to know of such a promise in order to evaluate testimony. See Giglio v United States

supra; Napue v Illinois, supra. Further, failure to provide such crucial evidence deprives the defendant of his "major weapon" in attacking the credibility of a witness against him, and will result in the testimony being accorded more weight than it merits. See, United States v Blackwood, 456 F2d 526, 530 (2nd Cir.), cert. den, 409 US 863 (1972); Napue v Illinois, supra, at 269.

The Georgia Supreme Court opinion clearly shows that the testimony of Marable was a key factor in that court's affirmance of Petitioner's death sentence. Fair, supra, at 869, 873, 880. Petitioner and Marable were recaptured after their escape on or about August 9, 1979; and on that date Marable gave his statement to Assistant District Attorney Stroberg (See, Exhibit 1 to deposition of Stroberg). Between the time of his statement and the trial of Petitioner's case, Marable plead guilty and was sentenced in Forsyth County, Georgia, - a certified copy of that sentence is on record in this case (H.T. 81-82). That sentence reflects that Marable plead guilty and received a sub-stantially lighter sentence than could have been imposed, on the specific condition that he testify against Petitioner. His testimony at Petitioner's hearing, while somewhat ambiguous, clearly shows that his testimony at Petitioner's trial was motivated by (a) the light sentence he received, and (b) the fact that his girlfriend was not prosecuted regarding his escape. On page 24 of his statement, Marable indicates he will testify against Fair "if ti will help me...," and clearly it did. No copy of his sentence was furnished to trial counsel, nor were they aware

of the conditions in it, even though they specifically requested this material.

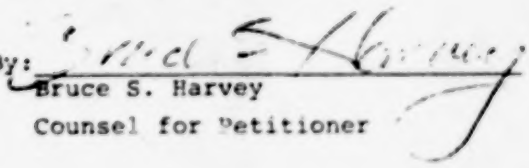
The non-disclosure established, the proper standard for review is, whether there was a reasonable likelihood that disclosure could have affected the trier of fact in evaluating witness credibility. United States v Butler, 567 F2d 885 (9th Cir. 1978). Since there was such a likelihood in the instant case, the sentence should be set aside and the case remanded for a new trial.*

* Cf. United States v Agrus, 427 US 98 (1976); Garrison v Maggio, 540 F2d 1271 (5th Cir, 1971) both distinguishing between non-disclosure of exculpatory evidence and impeaching evidence. Distinction can, and should be, drawn between the type of nondisclosed evidence involved. A strong case can be made that undisclosed promises of favorable treatment are uniquely within the discretion of the prosecutor's deliberate actions; and a prosecutor who fails to disclose such promises deliberately corrupts the truth-seeking process. Appellate review focusing on the importance of the witness testimony ("materiality") is faulty in that (a) it substitutes the court's judgment for that of the jury, and (b) the promise of favorable treatment itself amounts to an implicit admission that the witness' testimony is important to the case. There is no reason not to disclose: if it is so unimportant, disclosure will not be harmful to the case; and, if it is important, disclosure is constitutionally required.

CONCLUSION

For the reasons shown, a writ of certiorari should issue to review the judgment and opinion of the Superior Court of Butts County, Georgia.

Respectfully submitted

By: 
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